

Encouraging Competition Among Outside Counsel

This establishes the FDIC Legal Division's policy and procedures for encouraging competition among law firms (Outside Counsel) who seek to represent the FDIC. The purpose of the policy is to obtain for the FDIC the best possible legal services for the lowest available cost. The policy applies to all Sections of the Legal Division which retain Outside Counsel and replaces all previous directives on the subject.

When seeking to retain Outside Counsel, staff should consider alternative billing arrangements whenever possible, including fixed fees and contingency fees. Nevertheless, for some matters it will be clear from the outset that there will be no cost savings available from alternative arrangements. For other matters, external demands will make it impossible to devote the time necessary to negotiate such alternatives. Where, it is both economical and feasible, however, every effort should be made to negotiate alternative billing arrangements.

Each alternative billing proposal should be scrutinized for its potential to provide an incentive for the firm to minimize costs and maximize recoveries, in a timely fashion, to the FDIC. It is critical that staff and Outside Counsel have the same understanding of what is necessary to accomplish the goals of the retention. Therefore, firms wishing to propose alternatives to hourly billing should do so in objective terms (i.e., in dollars, time or measurable quality).

All alternative billing arrangements must be memorialized in writing before the firm is retained and a copy of the approved agreement, as described below, submitted to the Outside Counsel Section within 10 days. Outside Counsel must be made aware that, in all alternative billing arrangements, the gross amount of any recovery must be directed to the FDIC. The FDIC will reimburse the agreed upon fee when presented with the firm's bill.

Fixed Fees

Set pricing and volume discounts should be considered for routine matters, such as unlawful detainer, foreclosures, evictions, conveyances, routine collections, default judgments, bankruptcy proofs of claim, and relief from stays.

Fixed Fees (cont.)

The following procedures should be used to set fixed fees. Those sections and regions that are designed to employ fixed fees will draft fixed fee schedules within a reasonable amount of time, as determined by their respective Deputy General Counsel. These schedules should reflect the range of fees applicable to each geographic area and for each type of matter within the particular region's or section's jurisdiction. All schedules must be reviewed and approved by the appropriate Associate General Counsel or Assistant General Counsel, whichever is the highest ranking official. Staff attorneys shall agree to rates not higher than those reflected in these approved schedules when negotiating fixed fee arrangements with Outside Counsel.

All fixed fee schedules must be reviewed with the first quarter of each calendar year and adjusted as necessary to reflect market conditions with respect to the type of matter authorized and the amount of fee fixed for each type. The Associate or Assistant General Counsel, as appropriate, has discretion to determine the process by which the section's or region's schedule of fixed fees will be reviewed annually, but must approve any revisions no later than the end of the second quarter.

Setting a fixed fee other than those listed on the authorized, fixed fee schedule constitutes an amendment to the Legal Services Agreement (LSA).

Contingency Fees

Traditional contingency fee arrangements - e.g., payment based upon a percentage of the amount collected - may be a preferred method of payment for some matters, such as certain types of collections. In addition, staff are encouraged to use a modified form of contingency fee to prompt early settlement or other resolution. For example, a cap could be placed on discounted hourly-fee totals in combination with a percentage of recovery achieved by settlement. This minimizes the expense of legal services, especially litigation costs, and takes advantage of the preset value of funds. Moreover, the FDIC is willing to consider a sliding contingency fee where the amount of the contingent fee declines as the amount of recovery increases. For example, the contingency agreement could provide a 20% on a \$2,000 dollar recovery; 18% on the next \$3,000; and 14% on any additional amounts recovered. Of course, if the matter is such that the difficulty in recovery increases over time, the percentages could be reversed as an incentive to obtain full recovery.

Contingency Fees (cont.)

Because of their size, minority- and women-owned firms are sometimes unable to carry the costs of representation until payment of the contingency fee. Therefore, the FDIC will take particular care to consider adaptations of traditional contingency fee arrangements to ensure maximum participation by minority and women-owned law firms in matters referred on a contingency fee basis. For example, the time charges paid the firm could be discounted by 50% and some portion of the discount made contingent upon ultimate recovery in the matter. Moreover, the agreement could provide for recoupment of increasing amounts of the discount as settlements are reached, while capping the amount of fees paid to the firm prior to receipt of actual dollars by the FDIC.

All of these arrangements require the FDIC Oversight Attorney to assess accurately the value of the matter and to ensure that the terms of the fee agreement provide the FDIC cost effective legal services. Generally, however, these arrangements are appropriate where there are minimal risks to recover a large judgment. Consequently, they usually are not appropriate in director and officer or professional liability litigation. Alternative billing arrangements may be appropriate, however, for pursuit of narrow bond or insurance claims. Moreover, these arrangements may not be appropriate for marketing and resolving the failed or failing institution itself.

Where contingency fees are deemed an economical alternative to hourly billing, the delegations to approve such arrangements are as follows: with respect to the Liquidations Branch, the Oversight Attorney must approve arrangements paying up to 25% of recovery and the Regional Counsel must approve arrangements paying up to 33% of recovery. For Liquidation Branch contingency fee arrangements in excess of 33% of recovery and for all contingency fee arrangements proposed by any other Branch, the respective Associate General Counsel's approval is required.